LIBRARY
SUPREME COURT, U. S.

MAR 25 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, Respondent,

DOROTHY MAE DRIGGERS,

MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors,
by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;*

DOROTHY MAE DRIGGERS, Administratrix of the
Estate of Oscar Driggers, Jr., Deceased;

B & B SUPPLY COMPANY, a California Corporation,
Parties in Interest

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

FRANCIS L. YOUNG, JR.
THOMAS S. JACKSON
1701 K Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

Washington, D. C. - THIEL PRESS - 202 - 393-0625

SUBJECT INDEX

Table of Cases, Statutes and Rules i
Opinions Below 1
Grounds for Invoking Jurisdiction of this Court 2
Question Presented 3
Constitutional Provisions and Statutes 4
Statement of the Case 6
Argument for Allowance of the Writ 9
Appendix:
Memoranda filed in Superior Court ..... App. 1
Memoranda filed in Court of Appeal ..... App. 3
Petition filed in California Supreme Court ..... App. 6
Superior Court Order of January 23, 1968 ..... App. 7
Court of Appeal Order of February 20, 1968 ..... App. 8
California Supreme Court Order of March 1, 1968 ..... App. 9
Superior Court Order of March 19, 1968 ..... App. 10

TABLE OF CASES

Curtis Publishing Co. v. Cassel, 302 F.2d 132 (10th Cir. 1962) 14
Erlanger Mills v. Cohoes Fibre Mills, 239 F.2d 502 (4th Cir. 1956) 14
Gray v. American Radiator and Standard Sanitary Corporation, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) 14
Hanson v. Denckla, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 Sup. Ct. 1228 (1958) 9, 10, 11, 12, 16
Hearne v. Dow-Badische Chemical Company, 224 F. Supp. 90 (D. Tex. 1963) 14
Henry R. Jahn & Son, Inc. v. Superior Court, 49 C.2d 855, 323 P.2d 437 (1958) 13
Hodge v. Sands Manufacturing Company, 150 S.E.2d 793 (W. Va. 1966) 14

Hutchinson v. Boyd and Sons Press Sales, Inc.,
188 F. Supp. 876 (D. Minn. 1960) 14

International Shoe Co. v. Washington, 326 U.S. 310,
90 L. Ed. 95, 66 Sup. Ct. 154 (1945) 9, 14

McGee v. International Life Insurance Company,
355 U.S. 220, 2 L. Ed. 2d 223, 78 Sup. Ct. 199
(1957) 9, 11

McNutt v. General Motors Accept. Corp., 298 U.S. 178,
80 L. Ed. 1135, 56 Sup. Ct. 780 (1936) 11

Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957) 14

Painter v. Home Finance Company, 245 N.C. 576,
96 S.E.2d 731 (1957) 14

Proctor and Schwartz v. Superior Court,
99 C.A.2d 375, 221 P.2d 972 (1950) 11

Smyth v. Twin State Improvement Corp.,
116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193 (1951) 14

Taylor v. Portland Paramount Corporation,
383 F.2d 634 (9th Cir. 1967) 12

CONSTITUTION OF THE UNITED STATES

Amendment XIV, Sec. 1 ..... 4, 8, 12, 15, 16

STATUTES

California Civil Procedure Code:

Section 411 4
Section 416 4
Section 416.1 5
Section 416.3 ..... 5, 9
Section 1014 5

California Corporation Code, Section 6501 ..... 4, 7

COURT RULES

California Appellate Rules, Rule 24 ..... 6, 8, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

WYETH-SCOTT COMPANY, an Ohio Corporation,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, Respondent,

DOROTHY MAE DRIGGERS,

MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors,
by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;*

DOROTHY MAE DRIGGERS, Administratrix of the
Estate of Oscar Driggers, Jr., Deceased;

B & B SUPPLY COMPANY, a California Corporation,
Parties in Interest

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

OPINIONS BELOW

No opinion has been delivered in any of the three courts below.

GROUNDS FOR INVOKING JURISDICTION OF THIS COURT

Petitioner is one of 31 defendants in an action for damages for wrongful death filed in the Superior Court of the State of California for the County of Los Angeles. Petitioner moved in the trial court, the Superior Court, to quash service of summons on it as to the complaint of the plaintiffs and as to the cross-complaint of a co-defendant on the ground that Petitioner was a foreign corporation not doing business in the State of California, and, therefore, the Superior Court had no jurisdiction over the person of Petitioner. This motion was denied by the Superior Court on January 23, 1968. Pursuant to California procedure, Petitioner filed its petition in the Court of Appeal of the State of California, Second Appellate District, for a writ of mandate to compel the trial court to quash the services, but this petition was denied, without opinion, on February 20, 1968. This is the ruling of which Petitioner seeks review in this Court. Petitioner did file on March 1, 1968, a petition for hearing on the matter in the Supreme Court of California. Said petition for hearing was denied, without opinion, on the same day, March 1, 1968. Petitioner can have no further review of this matter in the California courts.

On March 4, 1968, the trial court signed an order extending the time within which Petitioner must plead to the merits until March 25, 1968. Petitioner sought additional time to permit it to seek relief in this Court by filing a motion in the trial court requesting a further extension of time for pleading to the merits. Said motion was heard and denied, without opinion, by the Superior Court on Tuesday, March 19, 1968. In order to forestall the entry of a default against Petitioner while, in pursuit of its lawful remedies, it seeks relief in the Supreme Court of the United States, Petitioner is preparing to plead to the merits of the claims against it in the Superior Court, appearing specially and under protest, and reserving all of its rights.

Jurisdiction to review the ruling of the Court of Appeals of the State of California, Second Appellate District, is conferred on the Supreme Court of the United States by the provisions of Section 1257(3), United States Code.

QUESTION PRESENTED

Whether Petitioner, an Ohio corporation, has been denied due process of law by the courts of the State of California in violation of the rights guaranteed to Petitioner by the 14th Amendment to the Constitution of the United States by holding that the Superior Court of the State of California for the County of Los Angeles has jurisdiction over the person of Petitioner, an Ohio corporation not doing business in California, in a Civil Action brought in said Superior Court by the survivors of a decedent seeking damages from the Petitioner and 29 other defendants for the alleged wrongful death of said decedent, when it is established on the record that Petitioner is an Ohio corporation, not registered or qualified to do business in California, and that Petitioner had no office or place of business or agents or employees in California, and that Petitioner owned no stock in trade or other property, real or personal, in California and that the contacts which Petitioner had with California upon which *in personam* jurisdiction is allegedly based consist solely in Petitioner's having sold to a California corporation, also a defendant in the action, a number of articles manufactured by Petitioner in Ohio and sold and delivered by Petitioner to said California corporation in Ohio, one of which devices was thereafter allegedly re-sold to decedent's employer and allegedly caused decedent's death.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment XIV, Sec. 1, Constitution of the United States

> "* * * [N]or shall any state deprive any person of life, liberty, or property, without due process of law; * * *"

California Code of Civil Procedure, Sec. 411. Summons; method of service.

> "* * *
>
> "2. Foreign corporations; * * *
>
> "2. If the suit is against a foreign corporation, or a nonresident joint stock company or association, doing business in this state: in the manner provided by Sections 6500 to 6504, inclusive of the Corporations Code." West's Annotated California Codes, vol. 14, 1967 Cum. Pocket Part, p. 77.

California Corporation Code, Sec. 6501. Service on secretary of state; court order; number of copies of process and order.

> "* * * [I]f no agent has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found after diligent search and it is so shown by affidavit to the satisfaction of the court or judge, then the court or judge may make an order that service be made by personal delivery to the Secretary of State or to an assistant or deputy secretary of state of two copies of the process together with two copies of the order, except that if the corporation to be served has not filed the statement required to be filed by Section 6403 then only one copy of the process and order need be delivered but the order shall include and set forth an address to which such process shall be sent by the Secretary of State." West's Annotated California Codes, vol. 24, p. 647.

California Code of Civil Procedure, Sec. 416. Jurisdiction of parties; time of acquisition. * * *

> "From the time of the service of the summons and of a copy of the complaint in a civil action, or of the

completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. * * * The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him." West's Annotated California Codes, vol. 14, p. 414.

California Code of Civil Procedure, Sec. 416.1. Notice of motion to quash service of summons for lack of jurisdiction; * * *

"Any defendant or cross-defendant upon whom service of summons has been made may serve and file, on or before the last day on which he is required to plead, or within such further time as the court may for good cause allow, a notice of motion to quash the service of summons, upon the ground of lack of jurisdiction of the court over him. * * *" West's Annotated California Codes, vol. 14, 1967 Cum. Pocket Part, p. 89.

California Code of Civil Procedure, Sec. 416.3. Mandamus to compel quashing of service of summons.

"If a motion of a defendant or cross-defendant to quash service of summons, as provided in Section 416.1 of this code, is denied by the court, he may, before pleading, and within 10 days after service upon him of written notice of the order of the court denying the motion, or within such additional time not exceeding 20 days as the court may allow, petition an appropriate appellate court for a writ of mandate directed to the court wherein the action or proceeding is pending requiring the entry of its order quashing the service of summons. * * *" West's Annotated California Codes, vol. 14, 1967 Cum. Pocket Part. p. 91.

California Code of Civil Procedure, Sec. 1014. Appearance defined; * * *

"A defendant appears in an action when he answers, demurs, files a notice of motion to strike, or gives

the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. * * *" West's Annotated California Codes, vol. 18, 1967 Cum. Pocket Part, p. 116.

California Rules of Court, Appellate Rules, Rule 24. Decisions of Reviewing Court.

"(a) When decisions become final. * * * A decision of a Court of Appeal becomes final as to that court 30 days after filing. * * * When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. * * *" West's Annotated California Codes, vol. 23 Pt. 1, p. 305, as amended eff. Nov. 11, 1966.

STATEMENT OF THE CASE

On February 14, 1967, Dorothy Mae Driggers, in her own right and as Guardian ad litem of her two minor daughters and as Administratrix of the estate of Oscar Driggers, Jr., deceased, filed suit in the Superior Court of the State of California for damages for the allegedly wrongful death of Oscar Driggers, Jr., Deceased. Thirty-one persons were named as defendants, one of whom is Jack Ray Driggers, son of decedent, who is alleged to be unwilling to join the plaintiffs in the suit. Petitioner and the remaining twenty-nine defendants are alleged to be liable on various grounds of negligence and breaches of warranty for wrongfully causing the death of decedent. With respect to Petitioner, the complaint alleges that Petitioner manufactured and sold a certain device which, while it was being used on an artificial oil drilling island in tideland waters near the city of Long Beach, California, on April 21, 1966, failed to function properly thus causing decedent to sustain bodily injuries which resulted in his death. One of the other defendants in this suit is B & B Supply Company, a California Corporation, which, the complaint alleges, pur chased the offending device from Petitioner and sold it to decedent's employer, defendant Guy F. Atkinson Company.

Not finding Petitioner within the State of California, Plaintiffs caused service to be made on Petitioner by serving the Secretary of State of California pursuant to California Code of Civil Procedure, Section 6501. Defendant B & B Supply Company filed a cross-complaint in the action against this Petitioner and, not finding Petitioner in the state, caused process to be served on Petitioner in the same manner.

Petitioner, appearing specially, moved in the Superior Court to quash both of these attempted services. Uncontroverted facts established by affidavits in the Superior Court show that Petitioner is an Ohio Corporation with its principal place of business in Newark, Ohio; Petitioner has never applied for a permit to do business in the State of California and has never qualified as a foreign corporation in California; Petitioner has never hired, maintained, or paid any salesman, sales representative or solicitor in California; Petitioner has never designated anyone as its agent for service of process in California; Petitioner has no stock in trade or any other property, real or personal, in California; Petitioner has never had an office or warehouse in California; Petitioner has no license or franchise agreement with anyone in California; Petitioner has never maintained a bank account or savings account in California; cross-claimant B & B Supply Company, is a California corporation doing business in California and is not controlled by or in any manner related to Petitioner other than as a buyer of Petitioner's products and Petitioner has no financial interest in B & B Supply Company.

The affidavits further establish that articles manufactured by Petitioner in the State of Ohio are sold by Petitioner in Ohio to cross-claimant B & B Supply Company and to other wholly independent concerns located in the State of California, who then sell said articles to other persons unknown to Petitioner; all articles manufactured by Petitioner in Ohio are shipped to B & B Supply Company and other retailers located in California "Free on Board, Newark, Ohio"; B & B Supply Company and other retailers of Petitioner's products purchase these articles from Petitioner on a cash basis; there

is no consignment shipping by Petitioner nor any similar type of arrangement whereby Petitioner retains ownership of its products after they leave Newark, Ohio, or pending their resale by those who buy them from Petitioner.

The affidavits further establish that of Petitioner's total gross sales of $259,040.03 in 1965, the gross sales to purchasers located in California totaled $13,156.63, and of Petitioner's total gross sales of $261,002.63 in 1966, the gross sales to purchasers located in California totaled $5,832.33.

The Superior Court, after hearing argument, denied the motion without opinion on January 23, 1968. Petitioner sought review of this ruling by filing a petition for a writ of mandamus with the California Court of Appeal, Second Appellate District, pursuant to the provisions of Section 416.3, California Code of Civil Procedure, to compel the lower court to quash service of the two summonses. The Court of Appeal denied this petition without opinion on February 20, 1968. Petitioner thereupon filed a Petition for Hearing in the Supreme Court of the State of California, said petition being in the nature of a petition for writ of certiorari to this Court. The California Supreme Court denied the petition, thus refusing to review the matter, without comment or opinion on the same day, March 1, 1968. Petitioner can have no further review of the question in the California courts. California Appellate Rules, Rule 24.

The applicability of the "due process clause" of the 14th Amendment and of pertinent decisions of the Supreme Court Court of the United States was presented to the trial court in the written memoranda filed and in oral argument, as appears from the oppositions to Petitioner's motion to quash filed in the trial court by plaintiffs (App. 1) and by B & B Supply Company (App. 2). The issue was presented to the Court of Appeal as appears from Petitioner's Memorandum of Points and Authorities (App. 3 & 4), B & B Supply Company's Reply to Petition (App. 6), and plaintiff's Answer to Petition (App. 5). Petitioner also presented this issue in its Petition for Hearing filed in the Supreme Court of California (App. 6).

Petitioner has exhausted the appeals available to it in the California Courts. Section 416.3, Code of Civil Procedure, provides that review of a trial court's denial of a motion to quash is by way of a petition to the Court of Appeals for a writ of mandamus. Rule 24 of the California Appellate Rules provides that, once the decision of the Court of Appeals becomes final (30 days after it is filed), the decision is not thereafter subject to modification or rehearing by the Court of Appeal.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I

This Court should allow the writ of certiorari because the California Courts have decided a Federal question of substance probably not in accord with the applicable decisions of this Court.

In *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 90 L. Ed. 95, 66 Sup. Ct. 154, this Court held that a foreign corporation must have certain minimum contacts with a state to permit the courts of that state to exercise personal jurisdiction over it. In *McGee v. International Life Insurance Company* (1957) 355 U.S. 220, 2 L. Ed. 2d 223, 78 Sup. Ct. 199, this Court did uphold jurisdiction of a California court over a foreign life insurance company in a case in which the contract had been made in California and the premium payments were mailed from California by the insured, a California resident. The Court pointed out that the beneficiaries under the policy could bring suit against only one potential defendant, namely the foreign insurance corporation, whose home office was in Texas. Barely six months later, in *Hanson v. Denckla* (1958) 357 U.S. 235, 2 L. Ed. 2d 1283, 78 Sup. Ct. 1228, this Court refused to sanction the exercise of personal jurisdiction by the courts of Florida over a foreign corporation and said:

> "* * * but it is a mistake to assume that this trend [toward exercise of jurisdiction over foreign corporations] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [citation omitted.] Those restrictions are more than a guaranty of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State are a pre-requisite to its exercise of power over him. See *International Shoe Co. v. Washington* [citation omitted]." 357 U.S. at 251.

The affidavits of record, as summarized on pages 7 and 8 of this Petition, clearly establish that Petitioner did not have the minimal contacts with California requisite for that State's courts to assert *in personam* jurisdiction over Petitioner. Like the Delaware trust company in *Hanson v. Denckla, supra,* Petitioner had no office in California and transacted no business there. No property belonging to Petitioner ever entered California and the record discloses no solicitation of business by Petitioner in California, either in person or by mail. "The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from *McGee v. International Life Ins. Co.* * * *". *Hanson v. Denckla, supra,* 357 U.S. at 251. The sole connection between Petitioner and the plaintiffs' decedent in the case at bar is that Petitioner allegedly manufactured an article which may have contributed to causing decedent's death. But this article had ceased to belong to Petitioner, and had become the property of B & B Supply Company, before the article ever left the city of Newark, Ohio, as had all other articles manufactured by Petitioner and sold to B & B or other persons located in California since all shipments were "F.O.B., Newark, Ohio."

Plaintiffs in the case at bar differ from the plaintiff in

McGee v. International Life Ins. Co., supra, in that in *McGee* there was but one potential defendant for the California plaintiff to sue, namely, a Texas life insurance company. In this case, however, there are a number of substantial defendants against whom plaintiffs can properly proceed in the California courts.

B & B was free to sell Petitioners' products to whomever it wished. Insofar as appears, the same is true with respect to all purchases from Petitioner of its products. It is manifestly unjust to subject a small enterprise like Petitioner to suit in every State in the Union in which its products may be resold by those who, in Ohio, purchase them from Petitioner.

> "* * * The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. International Shoe Co. v. Washington, * * *". *Hanson v. Denckla, supra,* 357 U.S. at 253.

The burden of establishing "some act by which [Petitioner] purposefully avails itself of the privilege of conducting activities within" California in order to subject Petitioner to the jurisdiction of the California courts is on those parties who assert that those courts have such jurisdiction. *Proctor and Schwartz v. Superior Court,* 99 C.A.2d 375, 379, 221 P.2d 972 (1950); *McNutt v. General Motors Accept. Corp.,* 298 U.S. 178, 80 L. Ed. 1135, 56 Sup. Ct. 780 (1936). In this case those parties, the plaintiffs and B & B, have not borne this burden, as the record clearly shows.

Thus the California courts have decided a Federal question of substance probably not in accord with the applicable decisions of this Court.

II

Almost ten years have passed since the decision of this Court in *Hanson v. Denckla, supra*. It is submitted that it is now necessary for this Court to speak again in this area since over the years there has developed a wide disparity in rulings and interpretations by State and Federal courts of the limitations imposed by the 14th Amendment and the pertinent decisions of the Supreme Court of the United States, and for the further reason that these courts constantly look to this Court for guidance.

The question of the jurisdiction of a court over the person of a foreign corporation poses constantly recurring problems for State and Federal courts. The due process clause of the 14th Amendment is repeatedly brought into consideration, even though the first inquiry is usually concerned with the provisions of a State "long-arm" statute. Indeed, many such statutes including the California statute, have been held to empower the courts of the State to reach as far as the 14th Amendment will permit.

In October, 1967, only five months ago, the United States Courts of Appeals for the Ninth Circuit, considering the Oregon "long-arm" statute, observed:

> "* * * [T]he courts of various states, including Illinois, have construed their long arm statutes as going as far as the due process clause of the Fourteenth Amendment will let them go. In effect, what *these courts* have done is to *abdicate their duty to construe the statutes of their own states and* to *turn it over to the Supreme Court of the United States*, which is the ultimate interpreter of the Constitution of the United States. We have no present reason to doubt that the Oregon courts will do likewise. We think that it is probably true that the legislators of Oregon wanted to enlarge the jurisdiction of its courts over non-residents to the fullest extent that the Constitution permits. The attempt thus to expand jurisdiction is no new phenomenon; it has just been more successful in recent years.

> "This is a federal question, and as to it we are controlled by decisions of the Supreme Court of the United States and by our own decisions." *Taylor v. Portland Paramount Corporation* (9th Cir. 1967) 383 F.2d 634, 640. (Emphasis added.)

The Supreme Court of California, speaking of the California long-arm statute, has said:

> "The statute authorizes service of process on foreign corporations that are 'doing business in this State.' That term is a descriptive one that the courts have equated with such minimum contacts with the state 'that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95. Whatever limitation it imposes is equivalent to that of the due process clause. '"[D]oing business" within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process.'" *Henry R. Jahn & Son, Inc. v. Superior Court*, 49 C.2d 855, 323 P.2d 437, 439 (1958).

The need and desire for further guidance from this Court was clearly pointed up by the following language of the Tenth Circuit Court of Appeals in 1962.

> "The impact of the due process clause on the in personam jurisdiction of state courts has presented a continuing problem to the courts which has resulted in a multitude of decisions, *none of which*, as yet, *lay down definitive standards* for universal application. * * *
>
> "* * * While these last two decisions [Vanderbilt v. Vanderbilt, 354 U.S. 416, and Hanson v. Denckla, 357 U.S. 235] disclose that the concept of territorial limitations on state power has not been discarded, it is noteworthy that each of them *involved private rather than corporate activities* and that neither questioned the validity of the 'minimum contact-fair treatment' rule of the International Shoe decision.

> "We believe that *International Shoe* is controlling and that the instant controversy must be resolved by the application of the *principles* there announced. Those principles are stated as conclusions and *do not provide the criteria required to sustain themselves.* We followed International Shoe in Steinway v. Majestic Amusement Co., 10 Cir., 179 F.2d 681, . . . and there said that, leaving every case to its own facts, to constitute doing business a nonresident corporation's activities must be substantial, continuous, and regular as distinguished from casual, single, or isolated. We shall apply these standards here." [Emphasis added.] *Curtis Publishing Co. v. Cassel*, 302 F.2d 132, 135, 136 (10th Cir. 1962).

Some courts, supposedly applying the principles of the *International Shoe* decision, have gone so far as to hold that the minimum contacts for the requisite jurisdiction may result from a single transaction, as in *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193 (1951); *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); *Painter v. Home Finance Company*, 245 N.C. 576, 96 S.E.2d 731 (1957); *Hutchinson v. Boyd and Sons Press Sales, Inc.*, 188 F. Supp. 876 (D. Minn. 1960). Other courts, applying the same principles to similar fact situations, have held that a single transaction did not provide the requisite minimum contacts. *Hodge v. Sands Manufacturing Company*, 150 S.E.2d 793 (W. Va. 1966); *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956).

Particularly startling are the opposite results arrived at in *Gray v. American Radiator and Standard Sanitary Corporation*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), and *Hearne v. Dow-Badische Chemical Company*, 224 F. Supp. 90 (D. Tex. 1963), on the one hand, wherein the courts after reviewing the latest decisions of this Court upheld service on foreign manufacturers of articles which allegedly caused injuries in the forum State, and in *Hodge v. Sands Manufacturing Company, supra*, on the other hand, in which the facts were almost identical both as to the relation of the defendant to

the injury and as to the contacts of the defendant with the forum State, the same recent decisions of this Court were carefully analyzed, and yet the attempted exercise of *in personam* jurisdiction was held to contravene the due process clause of the 14th Amendment.

The lack of consistency in the lower courts is underscored by the difference between the ruling of Division 4 of the California Court of Appeals, Second District, on November 27, 1967, in *Gill v. Surgitool Incorporated*, 64 Cal. Rptr. 207 (1967), and the conclusion reached by Division 2 of the same court in the case at Bar in February, 1968. The affidavits filed in *Gill* established that an artificial heart valve was manufactured by defendant Pennsylvania corporation in Pennsylvania where defendant received a purchase order and in response to the purchase order shipped the valve which was thereafter used to replace decedent's own aortic valve in an operation performed in a Los Angeles hospital. The complaint alleged that decedent later died because the valve was defective.

From the affidavit of one Phil Nelson, an employee in the supply department of Los Angeles County General Hospital, it appeared that he had

> "'a responsibility for ordering medical and hospital supplies and equipment.' This has been done 'both by correspondence and by telephone' with the defendant from whom 'we have received from time to time various brochures and publications consisting of catalogs, price lists, maintenance suggestion letters and offerings. * * * I have personally talked with the company at least one time that I can recall with reference to the purchase of a heart valve; we have also at the request of one or more of our doctors who use these valves in surgery, corresponded with Surgitool, Inc. and negotiated with the company for the modification of valves and return to us of the modified valves from Pittsburgh.'
>
> "It will be noted that nowhere does it appear that the Pennsylvania corporation took the initiative in

doing any business in California and it had no agent busy here. * * *" 64 Cal. Rptr. 210, 211.

Counsel are unable to perceive any meaningful difference between the extent of Surgitool's contacts with California and those of Wyeth-Scott in the case at bar.

From the foregoing brief analysis it is apparent that there is crying need for further guidance from this Court in order to bring uniformity to the decisions of the State and lower Federal courts which are repeatedly called upon to interpret and apply the due process clause of the 14th Amendment to the question of *in personam* jurisdiction over foreign corporations. Many courts have expressed this need and a desire for such guidance. A decade has passed since this Court last spoke in this area in *Hanson v. Denckla, supra.*

Wherefore, Petitioner prays that this Honorable Court grant this petition and issue a writ of certiorari to the Court of Appeal of the State of California, Second Appellate District, to review its final order dated the 20th day of February, 1968, which denied Petitioner's petition for writ of mandate to compel the trial court to quash service of summons.

Respectfully submitted,

FRANCIS L. YOUNG, JR.
THOMAS S. JACKSON
1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for Petitioner

APPENDIX

OPPOSITION OF PLAINTIFFS TO MOTION OF DEFENDANT WYETH-SCOTT COMPANY TO QUASH SERVICE OF PROCESS, FILED IN THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES

EXTRACT

* * *

It is respectfully submitted, however, that the affidavits filed in support of and in opposition to this motion amply demonstrate that Wyeth-Scott Company is amenable to service of process in this law suit, and that the motion to quash must be denied.

The fundamental principles which govern the determination of this motion are well known. As the Supreme Court of the United States has observed, the personal jurisdiction of the state courts is limited only by the requirements of due process; and due process requires only that in order to subject the defendant to a judgment *in personam,* the defendant must have certain minimum contacts with the forum state, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

International Shoe Co. vs. State of Washington, 326 U.S. 310, 66 Sup. Ct. 1054, 90 L. Ed. 95;

McGee vs. International Life Insurance Co., 355 U.S. 220, 78 Sup. Ct. 199, 2 L. Ed. 2d 223.

The decisions of the Supreme Court of California on this subject, as well as the decisions of the intermediate appellate courts of this state, make it perfectly clear that California will exercise its jurisdiction over foreign corporations to the full extent permitted by the federal constitution. [Page 2]

* * *

OPPOSITION OF CO-DEFENDANT AND CROSS-COMPLAINANT B & B SUPPLY COMPANY TO MOTION OF DEFENDANT WYETH-SCOTT COMPANY TO QUASH SERVICE OF PROCESS, FILED IN THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES

EXTRACT

* * *

The trial court granted the motion to quash, but this was *reversed on appeal;* the opinion saying at pages 227, 228:

> "The present state of the law, and the reasons therefor are expressed in the following quotations from *McGee v. International Life Insurance Co.* (1957), 355 U.S. 220, 222, 224 (78 S.Ct. 199, 2 L.Ed.2d 223): 'Since *Pennoyer v. Neff,* 95 U.S. 714 (24 L.Ed. 565), this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned "consent", "doing business", and "presence" as the standard for measuring the extent of state judicial power over such corporations. . . More recently in *International Shoe Co. v. Washington,* 326 U.S. 310 (66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057), the Court decided that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'".
> [Pages 10 and 11]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER WYETH-SCOTT COMPANY'S PETITION FOR WRIT OF MANDATE, FILED IN THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT.

EXTRACT

* * *

III

THE CALIFORNIA COURTS HAVE EQUATED THE "DOING BUSINESS" REQUIREMENT FOR SERVICE OF PROCESS ON A FOREIGN CORPORATION WITH THE "MINIMUM CONTACT" REQUIREMENT OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. [Page 10]

* * *

IV

PETITIONER'S "CONTACTS" WITHIN THE STATE OF CALIFORNIA FOR THE PURPOSE OF MAKING IT AMENABLE TO THE JURISDICTION OF THE CALIFORNIA COURTS, ARE NOT SUFFICIENT TO SATISFY THE REQUIREMENTS OF DUE PROCESS.

As already stated, the California courts have adopted the doctrine of minimum contacts to test whether a corporation is doing business for the purpose of the service of process. This doctrine was first stated by the United States Supreme Court in the case of *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945): [Page 13]

* * *

In the *International Shoe* case, the corporate defendant had eleven to thirteen very active salesmen residing in the state of Washington. The opinion went into some detail of the activities of these salesmen and concluded that by virtue of those activities the corporate defendant was amenable to process. The *International Shoe* case is easily distinguished from petitioner's case in that petitioner has no salesmen and conducts no business activities in the state of California.

After the *International Shoe* case, the United States Supreme Court handed down the case of *McGee v. International Life Insurance Company*, 355 U.S. 220 (1957). The

court in that case, applying the minimum contact doctrine, held that it was sufficient for the purpose of due process that a suit was based on a contract which had substantial connections with the state of California. As slim as the "contacts" in the *McGee* case might appear to be, they are still in fact greater than the "contacts" of petitioner with the state of California.* * * [Page 16]

* * *

* * * In *Hanson v. Denckla,* supra, the court stated at 250-51:

> "In *McGee* the Court noted the trend of expanding personal jurisdiction over non-residents. As technilogical progress has increased the flow of commerce between the States, the need for jurisdiction over non-residents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to those changes, the requirements for personal jurisdiction over non-residents has evolved from the rigid rule of *Pennoyer v. Neff* . . . to the flexible standard of *International Shoe Co. v. Washington*. . . . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See *Vanderbilt v. Vanderbilt*. . . . Those restrictions are more than a guarantee of immunity from inconvenience or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he had had the 'minimal contacts' with that state that are a prerequisite to its exercise of power over him." [Pages 18 & 19]

* * *

If this court applies the rule as stated in the *Denckla* case for determining whether the requirements of due process are satisfied, it can only reach one conclusion and that it is that petitioner was not amenable to the jurisdiction of California courts. * * * [Page 20]

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONER WYETH-SCOTT COMPANY'S PETITION FOR WRIT OF MANDATE, FILED IN THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

EXTRACT

* * *

1. IT IS THE POLICY OF CALIFORNIA TO EXTEND ITS JURISDICTION OVER FOREIGN CORPORATIONS TO THE FULL EXTENT PERMITTED BY THE FEDERAL CONSTITUTION.

There can be no question that it is the policy of California to provide relief to California residents in the courts of this state for any injuries sustained by them, to the full extent permitted by the due process clause of the Federal Constitution. * * * [Page M-1]

* * *

The proper inquiry, therefore, concerns the minimum requirements of the due process clause of the Federal Constitution, as that clause has been interpreted by the Supreme Court of the United States, and by the Supreme Court of this state. As Petitioner acknowledges, these requirements were set forth plainly enough in *International Shoe Co. v. State of Washington,* 326 U.S. 310, and *McGee vs. International Life Insurance Co.,* 355 U.S. 220. * * *" [Page M-2]

REPLY OF CO-DEFENDANT AND CROSS-COMPLAINANT B & B SUPPLY COMPANY TO PETITIONER WYETH-SCOTT COMPANY'S PETITION FOR WRIT OF MANDATE, FILED IN THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

EXTRACT

* * *

Hanson v. Denckla, 357 U.S. 235. This case is not even remotely in point; and merely relates to the question of whether a state has jurisdiction *in rem* over certain trust assets." [Pages 13 & 14]

* * *

PETITIONER WYETH-SCOTT COMPANY'S PETITION FOR HEARING, FILED IN THE SUPREME COURT OF CALIFORNIA

EXTRACT

* * *

The United States Supreme Court has recently formulated a doctrine of "minimum contacts" as a test of whether a corporation is "doing business" for the purpose of service of process. *International Shoe Company v. Washington,* 326 U.S. 310. * * * [Page 7]

* * *

The next decision of the United States Supreme Court concerning the minimum Contact Doctrine was *McGee v. International Life Insurance Company,* 335 U.S. 220. * * * [Page 8]

* * *

The United States Supreme Court re-stated the Minimum Contact Doctrine in the case of *Hanson v. Denckla,* 357 U.S. 235. That case is the last pronouncement of the Minimum Contact Doctrine by the United States Supreme Court and is the law of the land. [Page 8]

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPT. SOUTH H

Date: JAN 23 1968 Hon. MAX Z. WISOT, Judge; M VANDE WEERD, Deputy Sheriff; C E COLBY, Deputy Clerk; R WAKEFIELD, Reporter (Parties and counsel checked if present)

9:30 AM

5. 80 C 15120

DOROTHY MAE BRIGGERS, et al

vs

THUMS LONG BEACH COMPANY, a corporation, et al

Counsel for Plaintiff: Bodle, Vogel, Julber and Reinhardt By H. Chodas

Counsel for Defendant: Brill, Hunt, DeBuys & Burby By Abe Mutchnik; Parker, Stanbury, McGee, Peckham & Garrett By Richard Aishz

RT

STATISTICAL CODE CLERKS USE ONLY	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
	4080	71	00	00	69	3	000	00	000	000	00	11	00	10	00	3

NATURE OF PROCEEDINGS:

Defendant and Cross-Defendant, WYETH-SCOTT COMPANY, Motion to Quash Service of Summons, continued from January 9, 1968, comes on for hearing.

Counsel argue.

Motion is denied.

Notice is waived.

C E Colby

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

Minutes of February 20, 1968

DIVISION TWO

Civil No. 32732 Wyeth-Scott v. Superior Court, Los Angeles County

THE COURT:

Petition for writ of mandate denied.

Cause Due
March 21, 1968.

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, Civil No. 32732

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Court

WEIER-SCOTT COMPANY, ETC.,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY.

FILED

MAR 1 1968

WILLIAM I. SULLIVAN, Clerk

By _____ D. P. Deputy

Petition for hearing DENIED.

~~of the opinion that the petition should be granted~~

~~MOSK~~,

Acting ~~Chief Justice~~

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPT. SOUTH E

Date MARCH 19 1968 Hon. MAX E. WISOT, Judge; M VANDE WEERD, Deputy Sheriff; G E COLBY, Deputy Clerk; E WAKEFIELD, Reporter
(Parties and counsel checked if present)

9:30 AM

24. SO C 15120
DOROTHY MAE DRIGGERS, et al

vs

WYETH-SCOTT COMPANY, et al

Counsel for Plaintiff: Bodle, Fogel, Julber and Reinhardt By Daniel Fogal

Counsel for Defendant: Brill, Hunt, DeBuys & Burby

Parker, Stanbury, McGee, Peckham & Garrett By J. H. Peckham B1

STATISTICAL CODE CLERKS USE ONLY: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 — 6980

NATURE OF PROCEEDINGS:

Defendant and Cross-defendant, WYETH-SCOTT COMPANY, motion for an order extending time within which to enter a general appearance and plead to the complaint and cross-complaint, comes on for hearing.

Counsel argue.

Motion is denied.

DATE: DEPT. SOUTH E

LIBRARY
SUPREME COURT, U. S.

APR 19 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,
vs. *Petitioner,*

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, *Respondent,*

DOROTHY MAE DRIGGERS, MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors, by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;* DOROTHY MAE DRIGGERS, Administratrix of the Estate of Oscar Driggers, Jr., Deceased; B & B SUPPLY COMPANY, a California Corporation, *Parties in Interest.*

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

BRIEF FOR RESPONDENT B & B SUPPLY COMPANY IN OPPOSITION.

WILLIAM E. BURBY, JR.,
510 South Spring Street,
Los Angeles, Calif. 90013,
Counsel for Respondent B & B Supply Company.

Of Counsel:
BRILL, HUNT, DEBUYS & BURBY,
EDWARD A. DEBUYS, and
ABE MUTCHNIK.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

Page

Question Presented 2

Statement 3

Argument 8

I.

There Is No Important Question of Federal Law and No Conflict of Decision 8

II.

The Decision Below Is Clearly Correct 13

III.

Petitioner Has Filed Pleadings With Respondent Court Which Affect an Acceptance of Its Jurisdiction. The Issue of Jurisdiction, the Subject Matter of the Petition, Is Therefore Now Resolved, and Before This Court, Moot 17

Conclusion 20

TABLE OF AUTHORITIES CITED

Cases — Page

California Prune Etc. Assoc. v. H. R. Nicholson Co., 69 Cal. App. 2d 207, 158 P. 2d 764 19

Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P. 2d 409 ..... 14, 15

Gill v. Surgitool Incorporated, 64 Cal. Rptr. 207, 256 ACA 658 12

Goodwine v. Superior Court, 63 Cal. 2d 481, 407 P. 2d 1, 47 Cal. Rptr. 201 17

Gray v. American Radiator and Standard Sanitary Corporation, 22 Ill. 2d 432, 176 N.E. 2d 761 ..... 10, 14, 15

Hanson v. Denckla, 357 U.S. 235 14

Hearne v. Dow-Badische Chemical Company, 224 F. Supp. 90 ..... 10, 14, 15, 20

Hireen v. Interstate Transit Lines, 52 F. 2d 12 19

Hutchinson v. Boyd and Sons Press Sales, Inc., 188 F. Supp. 876 ..... 11, 14

International Shoe Co. v. Washington, 326 U.S. 310 9

McGee v. International Life Insurance Company, 355 U.S. 220 9

Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673 11

Painter v. Home Finance Company, 245 N.C. 576, 96 S.E. 2d 731 11

Regie Nationale des Usines Renault etc. v. Superior Court, 208 Cal. App. 2d 702, 25 Cal. Rptr. 530 ..... 14, 16

Rio Del Mar Etc. Club v. Superior Court, 84 Cal. App. 2d 227, 190 P. 2d 306 20

Page

Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P. 2d 739 17

Sims v. National Engineering Co., 221 Cal. App. 2d 511, 34 Cal. Rptr. 537 14

Smythe v. Twin State Improvement Corp., 116 Vt. 569, 80 A. 2d 664, 25 A.L.R. 2d 1193 11

Thomas v. J. C. Penney Co., 186 Cal. App. 2d 223, 8 Cal. Rptr. 721 14

Waco-Porter Corporation v. Superior Court, 211 Cal. App. 2d 559, 27 Cal. Rptr. 37 .....14, 16

Statute

California Code of Civil Procedure, Sec. 1014 17

IN THE

Supreme Court of the United States

October Term, 1967
No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

DOROTHY MAE DRIGGERS, MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors, by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;* DOROTHY MAE DRIGGERS, Administratrix of the Estate of Oscar Driggers, Jr., Deceased; B & B SUPPLY COMPANY, a California Corporation,
Parties in Interest.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

BRIEF FOR RESPONDENT B & B SUPPLY COMPANY IN OPPOSITION.

B&B Supply Company ("Supply Company") designated by Petitioner as a "Party in Interest" respectfully files this brief, on its own behalf and for no other party.

Question Presented.

Whether Petitioner, a manufacturer of a product, many of which are regularly sold at retail in California by various California resident distributors, but sold to the distributors at wholesale, f.o.b. Petitioner's factory in Ohio, and then shipped to the distributors by Petitioner, is amenable to process in the California courts after a California resident is killed while using one such product, and his survivors, California residents all, bring an action for wrongful death in a California court, naming Petitioner as one defendant, and allege that Petitioner's product was defective and that this defect proximately caused decedent's death; and Supply Company, one of Petitioner's California distributors, who sold the allegedly defective product to decedent's employer at retail, files a cross-complaint in the same California court naming Petitioner as cross-defendant and alleging breach of warranty, negligence, and a right to indemnity; and all the witnesses to the decedent's accident are California residents—particularly under the circumstance that Petitioner has actually filed with the California court its answers to the plaintiffs' complaint and Supply Company's cross-complaint, in both of which pleadings Petitioner has denied liability, raised affirmative defenses and concluded with a prayer that the court give judgment to Petitioner that plaintiffs and Supply Company "take nothing" by their pleadings and Petitioner recover its costs of suit.

Statement.

Petitioner Wyeth-Scott Company manufactures a certain wire rigging tension device called the "More Power Puller" and sells hundreds of these pullers in California every year, through the facilities of various California distributors. One such distributor, in the Southern California area, is Supply Company.

The procedure followed by Supply Company is to order Petitioner's pullers, about 24 at a time, by placing either a telephone call or a written order for same to Petitioner's factory in Newark, Ohio. Thereupon Petitioner ships the pullers thus ordered directly to Supply Company's Southern California business location, f.o.b. Petitioner's factory, on 30-days' credit. For these pullers Supply Company pays Petitioner a wholesale price, which represents a stated discount off of Petitioner's suggested retail price for the pullers.

Supply Company sells Petitioner's pullers to its customers in Southern California at retail, at Petitioner's suggested retail price.

In 1965 Petitioner sold to Supply Company alone (and Petitioner has other California distributors) 258 pullers; in 1966, 252 pullers; and in 1967 (as last computed) 145 pullers—most of which have already been resold, at retail, by Supply Company to Southern California users.

Petitioner's acting president, Julius Lenz, in an affidavit dated December 5, 1967, has himself attested that in 1965 Petitioner had gross sales of its pullers

throughout the United States of $259,040.03; and that included in this amount were *California sales* of $13,-156.63—more than *five percent* of total sales (See Pet. p. 8).

Petitioner furnishes to Supply Company (and to other California distributors) without cost, for broadside distribution to prospective California customers for Petitioner's puller, fully printed advertising brochures and "mail stuffers", wherein are extolled the virtues of the "More Power Puller". On each piece of its advertising Petitioner affixes the rubber stamped name and address of each particular distributor (including that of Supply Company) to whom that advertising is supplied, thus inviting sales of the puller through the named distributor.

In its brief to the California Court of Appeal Petitioner made the following statement:

> "Petitioner gives his [sic] customers [distributors] certain brochures describing the product. These brochures are stamped with the independent distributor's name and the potential customer is directed to go to that distributor."

One of Supply Company's large Southern California retail customers for Petitioner's pullers is the Guy F. Atkinson Company; and prior to April 21, 1966 Supply Company sold to Atkinson one particular puller, amongst others.

On or about April 21, 1966 one Oscar Driggers, Jr., a California resident, and employee of the Atkinson Company, was working on an Atkinson job in Southern

California. It is alleged in the Declaration of Eric Julber, attorney for Driggers' wife and children (also designated by Petitioner as "Parties in Interest"); which declaration was filed in the within action below; that Driggers was using the one particular puller purchased by the Atkinson Company to exert a pulling force on a certain piling; and that: "As the force was exerted, the rigging tension device broke, causing the piling to snap and to hurl the deceased into the water, causing his death. Discovery proceedings taken thus far in the case indicate, according to the deposition testimony of engineering experts, that said 'More Power Puller' was incorrectly labeled as to capacity, and that the wire embodied in said rigging tension device was not of sufficient capacity for the device's advertised uses."

After decedent's death his wife and children brought a wrongful death action (which is the primary action herein) against both Petitioner, Supply Company and nine other defendants (Petitioner has stated in his Petition that there are 31 defendants; evolved by the doubtful technique of including in its calculation the 20 fictitious *Does* named in the complaint) in respondent Superior Court of the State of California, County of Los Angeles.

Thereafter Supply Company filed a cross-complaint against Petitioner; alleging breach of warranty, negligence and the right to indemnity.

Both the Driggers' complaint and Supply Company's cross-complaint were served on Petitioner

through the Secretary of State of the State of California, as authorized by California statute.

Thereupon Petitioner made a special appearance before respondent Superior Court (the trial court) and moved to quash service of the complaint and cross-complaint. After due hearing this motion was denied.

Then Petitioner sought a writ of mandate before the Court of Appeal of the State of California, seeking to compel the lower court to quash service. After due consideration the writ was denied.

Next Petitioner sought a hearing in the Supreme Court of the State of California; which was denied.

Thereafter Petitioner filed its answers to both the complaint and the cross-complaint with respondent Superior Court; wherein Petitioner denied all liability to both the plaintiffs and Supply Company, raised affirmative defenses and prayed the court for a judgment declaring that Petitioner had no liability in respect to the complaint and cross-complaint and awarding Petitioner its costs of suit.

Petitioner included in each of its answers to the said pleadings, as one purported affirmative defense, the following allegation:

> ". . . No further extensions of time or courts of resort remain to cross-defendant [and defendant] in the State of California and plaintiff and cross complainant threatens to take default and to cause the default of defendant in the above-entitled action. Under this threat and compulsion and only because of it, cross-defendant [and defendant] files an answer in the above-entitled action to the complaint and cross complaint but denies that this

court has any jurisdiction of this cross-defendant [and defendant] in this action. Cross-defendant [and defendant] appears under protest and not voluntarily."

In actuality, Petitioner never even applied to Supply Company or its counsel for an extension of time in which to answer the cross-complaint, so that Petitioner would have the opportunity to petition this Honorable Court before answering; and at no time did Supply Company or its counsel threaten Petitioner with a default in the event that it did not file its answer to Supply Company's cross-complaint prior to petitioning this Honorable Court.

Nevertheless, it is settled California law, both statutory and case precedent, that by filing its answers Petitioner has already made a general appearance in, and has subjected itself to the jurisdiction of, the California courts, despite its so-called "affirmative defense" whereby it purported to challenge the jurisdiction of these courts—such a "reservation" being accorded no efficacy by the California courts. Accordingly, Petitioner's within Petition is actually rendered moot.

All the eyewitnesses to decedent's accident, fellow workers, are likewise California residents.

ARGUMENT.

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW AND NO CONFLICT OF DECISION.

Petitioner concedes in its Petition that it *regularly and not as an isolated incident* sells its product, the "More Power Puller", to California resident distributors; and that in 1965 such California sales approximated five percent of its national gross sales of the product:

> ". . . articles manufactured by Petitioner in the State of Ohio are sold by Petitioner in Ohio to cross-claimant B & B Supply Company and to other wholly independent concerns located in the State of California . . . all articles manufactured in Ohio are shipped to B & B Supply Company and other retailers located in California 'Free on Board, Newark, Ohio. . . .' " (Pet. p. 7).
>
> * * *
>
> ". . . of Petitioner's total gross sales of $259,040.03 in 1965, the gross sales to purchasers located in California totaled $13,156.63 . . ." (*ibid.* p. 8).

Likewise Petitioner concedes in its Petition that the within action involves California residents suing Petitioner in relation to an alleged defect in a product manufactured by Petitioner and sold in California to plaintiff's decedent, a California resident (Pet. p. 6):

> ". . . With respect to Petitioner, the complaint alleges that Petitioner manufactured and sold a certain device which, while it was being used on an artificial oil drilling island in tideland waters near

the City of Long Beach, California, on April 21, 1966, failed to function properly thus causing decedent to sustain bodily injuries which resulted in his death. . . ."

Further, Petitioner concedes in its Petition that in *International Shoe Co. v. Washington,* 326 U.S. 310, and *McGee v. International Life Insurance Company,* 355 U.S. 220, this Court held that the courts of a State have jurisdiction over a foreign corporation if that corporation has had a *"minimum contact"* with that State (Pet. p. 9).

And in connection therewith Petitioner also concedes in its Petition that the courts of various jurisdictions in applying the minimum contact rule of *International Shoe* have, "upheld service on foreign manufacturers of articles which allegedly caused injuries in the forum state"; and that, "Some courts, supposedly applying the principles of the *International Shoe* decision have gone so far as to hold that the minimum contacts for the requisite jurisdiction may result from a single transaction." (Pet. p. 14).

And in discussing the foregoing application of the "minimum contact" rule by the courts, Petitioner has gone so far as to cite in its Petition case decisions precisely factually in point with the cause at bar, in which it has been held that *if a foreign corporation's product is introduced into a State (even through the technique of selling the product f.o.b. the manufacturer's State) and that product proves defective and thereby injuries a resident of the State where introduced, and the resident (or his survivors) thereby brings an action in that State, and the eyewitnesses expected to testify at the trial are also residents of that State, these circum-*

stances fully satisfy the minimum contact requirement and serve to render the foreign corporation subject to the jurisdiction of the forum State and amenable to its process.

In one such case cited in the Petition, *Hearne v. Dow-Badische Chemical Company,* 224 F. Supp. 90 (S.D. Tex. 1963) also a wrongful death action, the defendant corporation manufactured a certain valve in Kansas and shipped it to Texas, where the plaintiffs' decedent was killed while using it. The defendant was served by substituted service and made a motion to quash. In denying the motion the trial court said, *inter alia,* at pages 99-100:

> ". . . I feel the State of Texas has a special interest in seeing that products delivered within its borders which are to be utilized in such a manner as to cause great hazard if negligently manufactured are sound and to this end is interested in providing a forum where actions may be brought to compensate its injured residents and thus encourage a high standard of care on the part of the manufacturers. . . ."

And in *Gray v. American Radiator and Standard Sanitary Corporation,* 22 Ill. 2d 432, 176 N.E. 2d 761 (1961) also cited in the Petition, the plaintiff in Illinois was injured while using a valve manufactured by the defendant corporation in Ohio, and the defendant made a motion to quash service of process, which was granted by the trial court. However, the Supreme Court of Illinois *reversed, with directions to the trial court to*

deny the motion to quash, and said, *inter alia,* at page 766:

> "As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products."

Indeed, Petitioner even concedes in its Petition, *page 14,* that in the following cases (cited by Petitioner) the courts have held a foreign corporation amenable to process following only a *"single transaction"* made by the corporation in the forum State: *Smythe v. Twin State Improvement Corp.,* 116 Vt. 569, 80 A. 2d 664, 25 A.L.R. 2d 1193 (1951); *Nelson v. Miller,* 11 Ill. 2d 378, 143 N.E. 2d 673 (1957); *Painter v. Home Finance Company,* 245 N.C. 576, 96 S.E. 2d 731 (1957); and *Hutchinson v. Boyd and Sons Press Sales, Inc.,* 188 F. Supp. 876 (D. Minn. 1960).

In truth, the only cases cited by Petitioner in its Petition wherein it was actually held that a foreign corporation defendant was *not* amenable to process in the forum State involved the circumstance that the corporation had only engaged in a "single transaction" in the forum state; in contrast to those, *supra,* where even a single transaction was deemed sufficient.

And indeed, when Petitioner's Petition is diagnosed it manifestly appears that Petitioner's only point of argument is that a conflict exists between those cases which hold that a "single transaction" in the forum State is sufficient to impart jurisdiction over a foreign

corporation; and those which hold that it takes more than such a "single transaction" (see Petition, p. 15). And, *urges Petitioner, this Court should "bring conformity to these decisions"* (Pet. p. 16).*

But, of course, at bar it is undisputed, and Petitioner has so conceded, that Petitioner's sale of the subject puller into California commerce was not an isolated transaction, but one of many hundreds of such sales.

Thus it becomes patently obvious that Petitioner has no standing here to urge that this Court should consider the issue of whether only a "single transaction" is sufficient to impart a State court's jurisdiction over a foreign corporation in relation to products liability; for as to Petitioner there is no such justiciable issue.

And it appears equally obvious that on the basis of the actual facts at bar Petitioner really has no quarrel with the ruling of respondent Superior Court in refusing to quash service of process upon it, and no ground upon which certiorari should, or could, be granted.

---

*Of all the "single transaction" cases cited in the Petition only one is not expressly so identified: *Gill v. Surgitool Incorporated,* 64 Cal. Rptr. 207, 256 ACA 658; but it is such, of course. And in urging that this Court grant certiorari, Petitioner says in his Petition (p. 15):

> "The lack of consistency in the lower courts is underscored by the difference between the ruling of Division 4 of the California Court of Appeals (sic), Second District, on November 27, 1967, in *Gill v. Surgitool Incorporated,* 64 Cal. Rptr. 207 (1967), and the conclusion reached by Division 2 of the same court in the case at bar in February, 1968."

(Actually there is *no inconsistency*: *Gill* involves a "single transaction", while the cause at bar relates to Petitioner's product, as to which there have been multiple sales in California).

II.

THE DECISION BELOW IS CLEARLY CORRECT.

To make certain that no argument touched on by Petitioner is left unanswered, no matter how specious it appears, Supply Company observes that Petitioner appears to be suggesting, without expressly so stating, that it is the very fact that it sells its products f.o.b. its factory in Newark, Ohio, with title passing there (and Petitioner thereupon shipping the product to California) that makes it invulnerable to California process—and that California would have jurisdiction over Petitioner only if Petitioner instead retained title until the product reached California. Thus Petitioner says (Pet. pp. 7, 8):

> ". . . there is no consignment shipping by Petitioner nor any similar type of arrangement whereby Petitioner retains ownership of its products after they leave Newark, Ohio. . . ."

Clearly, however, Petitioner's contention in this respect is totally vacuous; and certain it is that such a distinction without a difference remains universally unrecognized by our courts.

Actually, *such an "f.o.b. arrangement" as Petitioner emphasizes, wherein title passes in the State of origin, exists in virtually every case which Supply Company has observed wherein it was held that a foreign corporation was amenable to process in the forum State:*

Thus in the following California cases cited by Supply Company to the two California appellate courts

here involved: *Cosper v. Smith & Wesson Arms Co.*, 53 Cal. 2d 77, 346 P. 2d 409 (1959) the leading California case in point, the allegedly defective product was sold f.o.b. Springfield, Illinois to a California distributor; *Regie Nationale des Usines Renault etc. v. Superior Court*, 208 Cal. App. 2d 702, 25 Cal. Rptr. 530 (1962) the allegedly defective product was sold f.o.b. France; *Sims v. National Engineering Co.*, 221 Cal. App. 2d 511, 34 Cal. Rptr. 537 (1963) the allegedly defective product was sold f.o.b. Illinois; *Thomas v. J. C. Penney Co.*, 186 Cal. App. 2d 223, 8 Cal. Rptr. 721 (1960) the allegedly defective produce sold f.o.b. New York; and *Waco-Porter Corporation v. Superior Court*,* 211 Cal. App. 2d 559, 27 Cal. Rptr. 37 (1963) the allegedly defective product was sold f.o.b. Illinois.

As to the cases in point *cited in the Petition*, wherein it was held that a foreign corporation was amenable to process: *Hutchinson v. Boyd and Sons Press Sales, Inc.*; 188 F. Supp. 876 (D. Minn. 1960) the allegedly defective product shipped into Minnesota was sold f.o.b. Michigan; *Gray v. American Radiator and Standard Sanitary Corporation*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961) the allegedly defective product shipped into Illinois was sold f.o.b. Ohio; and in *Hearne v. Dow-Badische Chemical Company*, 224 F. Supp. 90 (S.D. Tex. 1963) the allegedly defective product shipped into Texas was sold f.o.b. Kansas.

**Waco-Porter* is one of many "service on foreign corporations for products liability" cases which distinguish *Hanson v. Denckla*, 357 U.S. 235, upon which Petitioner herein purports to rely; as being not even remotely in point factually with such cases (See 211 Cal. App. 2d 559, 564-5).

As has theretofore been shown, with pertinent citations thereto, two of the cases cited by Petitioner itself in its Petition: *Hearne v. Dow-Badische Chemical Company,* 224 F. Supp. 90, and *Gray v. American Radiator & Standard Sanitary Corporation,* 22 Ill. 2d 432, 176 N.E. 2d 761, expressly hold that a foreign corporation whose product is introduced into a State and allegedly causes an injury to a resident of that State through a defect is subject to the jurisdiction of the forum state and amenable to its process.

Additionally, in making its decision affirming the judgment of respondent Superior Court herein refusing to quash service of process on Petitioner in respect to the complaint and cross-complaint, the Court of Appeal of the State of California; and in refusing to grant Petitioner a hearing, the Supreme Court of the State of California; each had before it, in support of its own ruling, numerous case opinions factually in point with the cause at bar. Following are a few such cases, together with a brief and pertinent citation from each:

Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P. 2d 409, wherein it is said at page 83:

> "It further appears that the gun which exploded was sold in this state, the accident occurred in this state, the plaintiff is a resident in this state, and many of the witnesses who will probably be called at the trial are present in this state. Therefore, in view of all the facts, we deem it not inconsistent with 'traditional notions of fair play and substantial justice' to subject the defendant Smith and Wesson to the jurisdiction of the courts of this state in this action."

Waco-Porter Corporation v. Superior Court, 11 Cal. App. 2d 559, 27 Cal. Rptr. 371, wherein it is said at page 566:

> ". . . When Waco-Porter for its own 'advantage' availed itself of the privilege of selling its product to a California distributor for resale, it knew, or could reasonably be expected to know, that the equipment would be used by persons in California; that if there was a defect in the equipment it might result in an accident to a person using the equipment in California; that if an accident occurred the witnesses to the facts surrounding the accident would be at the situs of the accident. . . ."
>
> "Certainly it is not unreasonable to require petitioner to do that which it reasonably should have expected to do, namely, defend an action of this nature at the place where (a) the equipment was used, (b) the defect became known, and (c) the damage was caused. . . ."

Regie National Des Usines Renault v. Superior Court, 208 Cal. App. 2d 702, 25 Cal. Rptr. 530, wherein it is said at pages 703, 704:

> "'. . . defendant . . . has had adequate contact with California and California residents so that the maintenance of suit against it does not offend our notions of fair play and substantial justice (*International Shoe,* [citation]). * * *
>
> "'Apparently, where the tort occurs within the state, extensive sales and promotional contacts with California consumers through nonexclusive, independent sales representatives may constitute "doing business".'"

III.

PETITIONER HAS FILED PLEADINGS WITH RESPONDENT COURT WHICH AFFECT AN ACCEPTANCE OF ITS JURISDICTION. THE ISSUE OF JURISDICTION, THE SUBJECT MATTER OF THE PETITION, IS THEREFORE NOW RESOLVED, AND BEFORE THIS COURT, MOOT.

On March 25, 1968 Petitioner filed with respondent Superior Court pleadings which constitute answers to the plaintiffs' complaint and Supply Company's cross-complaint; and *under California statute this filing constitutes a general appearance and a full acceptance of the court's jurisdiction.*

California Code of Civil Procedure, Sec. 1014, provides, *inter alia,* as follows:

> "A defendant appears in an action when he *answers,* demurs . . . or gives the plaintiff written notice of his appearance. . . ." (emphasis supplied).

In *Sampsell v. Superior Court,* 32 Cal. 2d 763, 197 P. 2d 739 (1948) the California Supreme Court said, at page 773:

> "The trial court unquestionably had jurisdiction over the parties, for by answering plaintiff's complaint on the merits defendant waived any claim of lack of jurisdiction over her. (Code of Civ. Proc. § 1014; *Jardine v. Superior Court,* 213 Cal. 301, 304 (2 P. 2d 756, 79 ALR 291)."

And in *Goodwine v. Superior Court,* 63 Cal. 2d 481, 407 P. 2d 1, 47 Cal. Rptr. 201 (1965) the California Supreme Court said, at page 484:

> ". . . An answer, a demurrer, and a motion to strike constitute a general appearance (Code Civ.

Proc., § 1014), since a court does not decide questions raised by such pleadings at the behest of persons over whom it has no jurisdiction . . ."

At bar it is true that in its answer to Supply Company's cross-complaint (as well as in its answer to plaintiff's complaint) following the allegations of general denial of any liability and other affirmative defenses; and preceding Petitioner's prayer for judgment in its favor and for its costs; Petitioner has also included in its pleadings, as another purported affirmative defense, *inter alia,* the following averment:

". . . No further extensions of time or courts of resort remain to cross-defendant [and defendant] in the State of California and plaintiff and cross-complainant threaten to take default. . . . Under this threat and compulsion and only because of it, *cross-defendant* [and defendant] files an answer in the above-entitled action to the complaint and cross-complaint but *denies that this court has any jurisdiction of this cross-defendant* [and defendant] *in this action. Cross-defendant* [and defendant] *appears under protest and not voluntarily."* (emphasis supplied).

However, despite Petitioner's self-serving attempt to dilute the effect of its having generally appeared because of its answer; by the said purportedly qualifying language; the fact remains that *under California law, once an answer is filed it constitutes a full acceptance of jurisdiction, regardless of any language therein which purports to challenge the jurisdiction. Accordingly, Petitioner is now fully subject to the jurisdiction of the California courts and amenable to its process.*

In *California Prune Etc. Assoc. v. H. R. Nicholson Co.*, 69 Cal. App. 2d 207, 158 P. 2d 764 (1945) the Court of Appeal of California said in affirming a judgment for the plaintiff, at page 225:

> ". . . By its answer it [defendant] denied nearly every allegation pleaded in plaintiff's complaint, and prayed for general relief. True it is that *by its pleading it attempted to limit its appearance as special.* It cites no authority supporting such procedure. . . . *Under the facts the defendant made a general appearance* and the contention which it now makes may not be sustained." (emphasis supplied).

And in *Hireen v. Interstate Transit Lines*, 52 F. 2d 12 (N.D. Calif. 1931) the defendant, also a foreign corporation, filed a demurrer and motion to dismiss with the Federal District Court, wherein it alleged that the court had no jurisdiction over it. The court in ruling on the demurrer and motion to dismiss *agreed* with the defendant that normally it would not have had jurisdiction; but held that *by filing the demurrer the defendant had, under California law, accepted jurisdiction;* saying at page 183:

> "In this case, however, I am of the opinion that even though the court did not have jurisdiction otherwise, it would now have so because the defendant has submitted to the jurisdiction of the court by filing a general appearance. . . . In the present case, I believe that the defendant has filed a general appearance by demurring on the grounds of lack of jurisdiction of the person of the defendant and also of the subject-matter of the action."

(A demurrer and an answer are equally considered to be a form of "answer" under California law (See, *Rio Del Mar Etc. Club v. Superior Court,* 84 Cal. App. 2d 227, 228, 190 P. 2d 306 (1948)).

*Accordingly it is settled that Petitioner already has, by filing its answers with respondent Superior Court, accepted the jurisdiction of that court; and that this Petition, now seeking certiorari purportedly to resolve the same question of jurisdiction, has come too late, and the entire matter is moot.**

CONCLUSION.

In *Hearne v. Dow-Badische Chemical Company,* 224 F. Supp. 90 cited by Petitioner, it is stated (as heretofore cited) that a forum State: "is interested in providing a forum where actions may be brought to compensate its injured residents and thus encourage a high standard of care on the part of the manufacturers."

Petitioner, however, makes it clear that it does not agree; and that as far as it is concerned, it would much prefer to escape process and responsibility altogether, regardless of the extent of defect present in its subject power puller or the degree of Petitioner's fault thereby —even if this means leaving some other defendant (including Supply Company) "holding the bag". In this respect Petitioner candidly says in its Petition, page 11:

> ". . . In this case, however, there are a number of substantial defendants against whom plaintiffs can properly proceed in the California courts."

---

*Petitioner has even still further accepted the jurisdiction of respondent court, by filing, on March 25, 1968, in the within action, a cross-complaint against Upson-Walton Company, manufacturer of wire rope allegedly used in the "More Power Puller".

Supply Company respectfully submits that even if this rationale constituted some support for Petitioner's Petition herein (and of course it does not, but is instead monstrous in its connotation) it still overlooks the fact of Supply Company's *cross-complaint, as to which Petitioner is the only named defendant.* If Petitioner were to escape the jurisdiction of respondent Superior Court there would then be *no* "substantial defendants" against whom *Supply Company* could "properly proceed in the California courts."

Respectfully submitted,

WILLIAM E. BURBY, JR.,
Counsel for Respondent B & B Supply Company.

Of Counsel:
BRILL, HUNT, DEBUYS & BURBY,
EDWARD A. DEBUYS, and
ABE MUTCHNIK.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 23 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

DOROTHY MAE DRIGGERS, MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors, by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;* DOROTHY MAE DRIGGERS, Administratrix of the Estate of Oscar Driggers, Jr., Deceased; B & B SUPPLY COMPANY, a California Corporation,
Parties in Interest.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

BRIEF OF DOROTHY MAE DRIGGERS IN OPPOSITION TO PETITION FOR CERTIORARI.

HILLEL CHODOS,
9107 Wilshire Boulevard,
Beverly Hills, Calif. 90210,
Attorney for Dorothy Mae Driggers.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Statement of the Case	1
Question Presented	3
Jurisdiction	3
Argument for Denial of Certiorari	5
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Page
Borgward v. Superior Court, 51 Cal. 2d 72, 330 P. 2d 789	3
Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P. 2d 409	3, 9
Curtis Publishing Co. v. Cassel, 302 F. 2d 132	6
Empire Steel Corp. of Texas, Inc. v. Superior Court, 56 Cal. 2d 823, 17 Cal. Rptr. 150	6
Gill v. Surgitool Incorporated, 256 Adv. Cal. App. 658, 64 Cal. Rptr. 207	6
Hanson v. Denckla, 357 U.S. 235	5, 6
Harry Gill Company v. Superior Court, 238 Cal. App. 2d 666, 48 Cal. Rptr. 93	6
Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 323 P. 2d 437	3
International Shoe Co. v. State of Washington, 326 U.S. 310	5
McGee v. International Life Insurance Co., 355 U.S. 220	5, 6
Rothschild v. Erda, 258 Adv. Cal. App. 859, 66 Cal. Rptr. 209	6
Thomas v. J. C. Penney Co., 186 Cal. App. 2d 223, 8 Cal. Rptr. 721	3

Statutes

California Code of Civil Procedure, Sec. 411 2
California Code of Civil Procedure, Sec. 416.1 3
California Code of Civil Procedure, Sec. 416.3 3
California Corporations Code, Sec. 6501 2
United States Code, Title 28, Sec. 1257(3) 4
United States Constitution, Fourteenth Amendment 3

IN THE

Supreme Court of the United States

October Term, 1967
No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,

vs. *Petitioner,*

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, *Respondent,*

DOROTHY MAE DRIGGERS, MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors, by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;* DOROTHY MAE DRIGGERS, Administratrix of the Estate of Oscar Driggers, Jr., Deceased; B & B SUPPLY COMPANY, a California Corporation, *Parties in Interest.*

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

BRIEF OF DOROTHY MAE DRIGGERS IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of the Case.

Dorothy Mae Driggers is the widow of Oscar Driggers, who was killed in a construction accident at Long Beach, California, on April 21, 1966. Mrs. Driggers commenced this action in the Superior Court of Los Angeles County for wrongful death against various persons and firms alleged to be responsible. According to the complaint, the accident was caused by a defec-

tive mechanical device known as a "More Power Puller," which had been purchased by Driggers' employer from B & B Supply Company, and which had been manufactured by Petitioner Wyeth-Scott, an Ohio corporation.

The summons and complaint were served upon Petitioner through California's Secretary of State, pursuant to the procedure for substituted service specified in §411 of the California Code of Civil Procedure, and §6501 of the California Corporations Code. B & B Supply Company, which had also been named by Driggers as a defendant, filed a cross-complaint for indemnity against Petitioner, which cross-complaint was also served upon Petitioner through the Secretary of State.

Petitioner appeared specially in the Superior Court, and moved to quash service of the complaint and cross-complaint for lack of personal jurisdiction, asserting that it was not and had not been "doing business" in California. The motion to quash was supported by affidavits and points and authorities; and counter-affidavits and points and authorities were filed by Driggers and by B & B Supply Company.

Petitioner's affidavits were to the effect that Petitioner was an Ohio corporation which had not formally qualified to do business in California, and that it had no branch offices, warehouses, bank accounts or employees in California. However, it appeared without contradiction from the counter-affidavits that Petitioner had been actively selling its products in California for fifteen years, through B & B Supply Company and other distributors; and that through this device, Petitioner had done a substantial volume of business in

California. After considering the affidavits and hearing the argument, the motion to quash was denied by the Superior Court.

Thereafter, Petitioner sought review of this order in the Court of Appeal and in the Supreme Court of California, pursuant to the procedure outlined in §§416.1 and 416.3 of the California Code of Civil Procedure. Relief was denied summarily by the California appellate courts, neither of which wrote an opinion. This Petition for Certiorari followed.

Question Presented.

The sole question presented by this proceeding is whether the California courts were justified in weighing the affadavits and counter-affidavits filed in connection with the motion to quash, and finding that Petitioner was "doing business" in California to such an extent that the California courts could assert personal jurisdiction over Petitioner, without doing violence to the due process clause of the Fourteenth Amendment.

Jurisdiction.

The decisions of California's appellate courts make it clear that California's long-arm statutes are intended to assert jurisdiction over foreign corporations to the full extent permitted by the due process provisions of the Federal Constitution. See for example:

Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P. 2d 409;

Borgward v. Superior Court, 51 Cal. 2d 72, 330 P. 2d 789;

Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 323 P. 2d 437;

Thomas v. J. C. Penney Co., 186 Cal. App. 2d 223, 8 Cal. Rptr. 721.

The outer boundaries of the due process clause are, of course, defined by federal law, as interpreted by the decisions of this Court; and in view of Petitioner's claim that the assertion of personal jurisdiction by the California courts in this case is a violation of its right to due process, it must be conceded that a federal question is presented. Accordingly, Petitioner correctly states that jurisdiction is conferred on this Court by the provisions of 28 U.S.C. § 1257(3).

ARGUMENT FOR DENIAL OF CERTIORARI.

The constitutional boundary for the assertion of *in personam* jurisdiction by state courts over foreign corporations was established by this Court some years ago in *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945). In that case, this Court held that

> "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [326 U.S. at 316].

Twelve years later this fundamental principle was reaffirmed in *McGee v. International Life Insurance Co.,* 355 U.S. 220 (1957) and in *Hanson v. Denckla,* 357 U.S. 235 (1958).

In *McGee,* this Court upheld the *in personam* jurisdiction of the California courts over a Texas insurance company; whereas in *Hanson*—decided only six months later—it was held that the Florida courts did not have jurisdiction over certain Delaware trustees. Petitioner professes to be confused by an alleged inconsistency between these latter decisions, and asserts that the constitutional boundaries have somehow been rendered vague and uncertain. According to Petitioner, the time is ripe for this Court to discuss the problem anew, with a view to establishing clear and simple criteria for determining the limits of the long-arm jurisdiction of the several states.

It is respectfully submitted, however, that there is no substantial confusion in the law. On the contrary, the rule of *International Shoe Company v. Washington, supra,* is clear enough; and if it produces different re-

sults in different cases, it is only because the rule is one which must be applied separately to the facts of each case. Indeed, the different results reached in *McGee* and *Hanson, supra,* merely emphasize that the rule is designed to be applied on a case-by-case basis.

As Petitioner apparently acknowledges, the lower federal courts have recognized that every case must be left to its own facts [*Curtis Publishing Co. v. Cassel,* 302 F. 2d 132, 136 (10th Circuit, 1962)], and the California courts have made the same observation [*Empire Steel Corp. of Texas, Inc. v. Superior Court,* 56 Cal. 2d 823, 17 Cal. Rptr. 150; *Harry Gill Company v. Superior Court,* 238 Cal. App. 2d 666, 48 Cal. Rptr. 93].

The published decisions of California's appellate courts make it clear that California is fully cognizant of the Constitutional limitations of its *in personam* jurisdiction, and that it will freely deny jurisdiction to its trial courts when such action is warranted by the facts of a particular case. See, by way of illustration, two recent decisions of the Courts of Appeal of California: *Gill v. Surgitool Incorporated,* 256 Adv. Cal. App. 658, 64 Cal. Rptr. 207. *Rothschild v. Erda,* 258 Adv. Cal. App. 859, 66 Cal. Rptr. 209 (quoting and following the principle enunciated in *Hanson v. Denckla, supra,* 357 U.S. 235).

In any event, even if the law of *in personam* jurisdiction over foreign corporations were fuzzy at the boundary lines, it is respectfully submitted that the case at bench does not provide this Court with an appropriate vehicle for clarifying those boundary lines. Whether the "minimum contacts" rule is construed strictly or liberally; and wherever the line of demarcation may lie between "doing business" in California and "not doing business" in California; the undisputed facts presented

to the trial court amply demonstrate that Petitioner is amenable to the jurisdiction of the California courts in this action.

To be sure, Petitioner is an Ohio corporation which has not formally qualified to do business in California. Admittedly, Petitioner has no branch offices, warehouses, bank accounts, telephone numbers or employees in California. But the record shows that Petitioner has been "doing business" in California on a substantial scale for years, albeit such business has been conducted through intermediaries.

The trial judge had before him the affidavit of Julius Lenz, an officer of Petitioner [Part of Exhibit F to Petition for Writ of Mandate, filed in the California Court of Appeal]. This affidavit contains a lengthy recital of Petitioner's activities in the State of Ohio, but also admits that Petitioner has sold More Power Pullers to B & B Supply Company and "to other business entities in the State of California," and that these sales by Petitioner have been made on the understanding that the More Power Pullers would be resold at retail by the purchasers thereof, obviously to California users. Lenz further admits that, in 1965 and 1966, Petitioner's gross sales in California totalled approximately $19,000.00, very nearly 4% of its total gross volume of sales. Lenz also asserted that all of Petitioner's sales were made on a cash basis, and that it did not extend credit to purchasers in the State of California.

However, the trial judge also had before him the declaration of Irving Blumberg, the president of B & B Supply Company [Exhibit H to Petition for Writ of Mandate]. Mr. Blumberg contradicted Lenz' assertion that sales were made on a cash basis, and stated instead that sales were made on a thirty day credit basis; and in

fact attached a copy of one of Petitioner's invoices to prove it. On this point, the evidence clearly preponderated against Petitioner; and may well have given the trial judge reason to discredit much of Lenz' other testimony. Furthermore, Blumberg's declaration contained considerable additional facts which stand uncontradicted in the record. According to Blumberg, B & B Supply Company has been the distributor of Petitioner's More Power Pullers in Southern California for fifteen years. During this time, Petitioner has sent many of these devices into California for resale to California users; and in fact all of them have been sold to California users. Indeed, in 1965, 1966 and 1967, some 650 of Petitioner's More Power Pullers were purchased by B & B Supply Company and resold to California users; and this does not even include any More Power Pullers distributed by Petitioner through other outlets in California (as suggested by Lenz' affidavit). Blumberg further stated in his declaration that Petitioners supplied B & B Supply Company with brochures describing the More Power Pullers, and encouraging their purchase and use; and stated that these brochures were distributed in California and were utilized by B & B salesmen in distributing the More Power Pullers to the California public. Finally, Blumberg's declaration makes it clear that the Guy F. Atkinson Company (the employer of Oscar Driggers, who was killed in the accident) was a regular purchaser of More Power Pullers; and that it had undoubtedly purchased the very device allegedly responsible for the accident from Petitioner through B & B Supply Company.

In summary, the evidence before the trial court demonstrated that Petitioner has been selling its More Power Pullers in California for fifteen years; that, dur-

ing the last three years, it has sold over 650 More Power Pullers for resale to California users through B & B Supply Company alone, to say nothing of any items sold through other California distributors; that B & B Supply Company, as the distributor of these items, maintains a stock of Pullers and parts; and that, during 1965 and 1966, 4% of Petitioner's gross volume of business was done in California. Under these circumstances, it was clearly reasonable for the trial court to find, as a factual matter, that Petitioner has such "minimum contacts" with California that it did not offend "traditional notions of fair play" to require Petitioner to defend this action, particularly in view of the other circumstances present in the case. These other circumstances are set forth in the declarations of Dorothy Mae Driggers and Eric Julber [Part of Exhibit G to Petition for Writ of Mandate]. These declarations establish that Dorothy Mae Driggers and Oscar Driggers are long-time California residents; that Oscar Driggers was killed in an accident in California, while he was working under a contract of employment made in California; and that all of the witnesses are Californians.

Petitioner contends that it is situated in Ohio, and that it confines its business activities to that state; and asserts that it is not amenable to the personal jurisdiction of the California courts, merely because it does not have full-time employees or agents in California. A similar argument has been presented to, and expressly rejected by, the Supreme Court of California in *Cosper v. Smith & Wesson Arms Co., supra,* 53 Cal. 2d 77, 346 P. 2d 409. In that case, too, Smith & Wesson conducted its California activities through an "independent" factory representative or distributor, who was not directly an employee of the company. The Court rested

its decision essentially on the obvious fact that Smith & Wesson had been selling its product in this state for many years to Californians; had been reaping profits and other advantages from the substantial volume of business which it did in this state; and had knowingly exposed countless residents of California to the risk of injury from such of its products as might have been defectively designed or manufactured. Under these circumstances, the Court had no difficulty in holding that, when a California resident bought a Smith & Wesson product in California, and was injured here as a result of that product's defective design and manufacture, he was entitled to proceed against Smith & Wesson in the California courts to recover the damages proximately caused by Smith & Wesson's business activities in this state. It is respectfully submitted that Oscar Driggers was in the identical situation; that Petitioner has been exploiting the lucrative California market for its products actively, continuously and in substantial volume for many years; that the trial court's order denying Petitioner's motion to quash service of summons was amply supported by the facts and compelled by law; and that there are no considerations of law, of equity, or of due process which would warrant the granting of certiorari or a reversal of that decision by this Court.

Conclusion.

For all of the foregoing reasons, the Petition for Certiorari should be denied.

Dated: April 22, 1968.

Respectfully submitted,

HILLEL CHODOS,
Attorney for Dorothy Mae Driggers.

LIBRARY
SUPREME COURT, U. S.

FILED
APR 25 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, Respondent,

DOROTHY MAE DRIGGERS,

MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors,
by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;*

DOROTHY MAE DRIGGERS, Administratrix of the
Estate of Oscar Driggers, Jr., Deceased;

B & B SUPPLY COMPANY, a California Corporation,
Parties in Interest

PETITIONER'S REPLY BRIEF TO BRIEFS OF DOROTHY MAE DRIGGERS AND B & B SUPPLY COMPANY IN OPPOSITION

FRANCIS L. YOUNG, JR.
THOMAS S. JACKSON
1701 K Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1260

WYETH-SCOTT COMPANY, an Ohio Corporation,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES, Respondent,

DOROTHY MAE DRIGGERS,

MARILYN KAY DRIGGERS, and KAREN LEE DRIGGERS, Minors,
by DOROTHY MAE DRIGGERS, their Guardian *ad Litem;*

DOROTHY MAE DRIGGERS, Administratrix of the
Estate of Oscar Driggers, Jr., Deceased;

B & B SUPPLY COMPANY, a California Corporation,
Parties in Interest

PETITIONER'S REPLY BRIEF TO BRIEFS OF DOROTHY MAE DRIGGERS AND B & B SUPPLY COMPANY IN OPPOSITION

ARGUMENT

I

Decisions Below Are in Conflict

B & B Supply Company, hereinafter referred to as "Supply Company", is incorrect in asserting that there is no conflict in decisions of the lower courts save in "single trans-

action" cases, and that only in such cases has a foreign defendant been found beyond the jurisdiction of the forum court.

See, for instance, *Taylor v. Portland Paramount Corporation*, 383 F.2d 634 (9th Cir., October 19, 1967), wherein the conduct outside of Oregon of Defendant Elizabeth Taylor "continuously since the early part of the year 1962" was alleged to have injured the exhibition property rights and business interests in Oregon of plaintiff, an Oregon film distributor, yet the court of appeals found no jurisdiction and reversed the trial court.

Supply Company cites the California case of *Regie Nationale des Usines Renault, etc. v. Superior Court*, 208 Cal. App. 2d 702, 25 Cal. Rptr. 530 (1962), wherein the California forum courts upheld their jurisdiction over a foreign automobile manufacturer, but neglects to mention the later ruling in *Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292 (6th Cir., 1964), where the court considered the same distribution scheme and similar corporate relationships and activities and, applying the principles of *International Shoe Company v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), and *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), ruled that the forum court had no jurisdiction over the foreign automobile manufacturing corporation.

Supply Company says that the recent ruling of the same District Court of Appeal which is respondent here in *Gill v. Surgitool Incorporated*, 64 Cal. Rptr. 207 (1967), involved a "single transaction" case. This is not so, as a careful reading of the affidavit as quoted in the opinion indicates.

> "* * * [W]e have also at the request of one or more of our doctors who use these valves in surgery, corresponded with Surgitool, Inc., and negotiated with the company for the modification of valves and return to us of the modified valves from Pittsburgh." 64 Cal. Rptr. 210, 211.

At page 9 of her brief in opposition, Dorothy Mae Driggers, plaintiff below, indicates that the case at bar is similar, in its facts and result, to the case of *Cosper v. Smith & Wesson Arms Co.*, 53 Cal.2d 77, 346 P.2d 409. This is not so. In the *Cosper* case there existed a "manufacturer's representative", a California resident located in California, who was employed by defendant Smith & Wesson to handle complaints, service users, and otherwise generally to promote the sale and use of Smith & Wesson products in California—and this manufacturer's representative was *paid directly* by Smith & Wesson. The existence of this individual was apparently the deciding factor in the *Cosper* case. There is no such representative in the case at bar. Wyeth-Scott conducted no activities whatever in California.

> "* * * The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. International Shoe Co. v. Washington, * * *". *Hanson v. Denckla*, 357 U.S. 235, 253.

II

The Jurisdictional Point Is Not Moot

Supply Company says that Petitioner has rendered its position in this Court moot because, under compulsion, it has answered the complaint in the trial court. Supply Company thus argues that the California courts can arbitrarily deprive Petitioner of any effective opportunity to be heard in this Court. Such a position is contrary to reason and the law.

Petitioner had obtained an extension of time within which to seek appellate review until March 25, 1968. After it was

refused a hearing in the Supreme Court of California on March 1, 1968, Petitioner sought an additional extension of time to permit it to seek redress in this Court, in which, by Federal statute (28 U.S.C. § 2101(c)), it had 90 days from entry of the final order below to file its petition for certiorari. This motion for additional time was denied by the trial court on March 19, 1968 (App. 10). Petitioner then had two alternatives open: to plead to the merits under protest, or stand aloof and risk a default judgment. No litigant should be placed in such a dilemma as that in which Supply Company would place Petitioner. Petitioner chose what appeared to be the lesser of two evils.

> "* * * To borrow a maxim from the civil side of the common law, where there is a wrong done, with injury, there is a remedy." *Dancy v. United States*, 361 F.2d 75, 124 U.S. App. D.C. 58, 62 (1965).

This Court has said that review will be allowed where its judgment will have some material effect, even though petitioner's position may appear moot. *Pollard v. United States*, 352 U.S. 354, 358, 1 L. Ed. 2d 393, 77 St. Ct. 481 (1957). Clearly, a determination by this Court in favor of Petitioner on the merits will be of material effect. And surely no lower court would be so rash as to attempt to proceed with the case below if this Court should grant certiorari.

The California cases cited by Supply Company are not apposite. In one of them the quoted language is merely dicta in a case in which the trial court did stay the effectiveness of its order pending review. In the others no effort was made by the defendant to seek appellate review of the jurisdictional point before pleading to the merits, or the defendant simply coupled his first raising of the jurisdictional point with a plea to the merits.

It will be noted that Dorothy Mae Driggers, in her brief in opposition, does not even raise this objection, and concedes that this Court has jurisdiction.

CONCLUSION

It is submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

FRANCIS L. YOUNG, JR.
THOMAS S. JACKSON
1701 K Street, N. W.
Washington, D. C. 20006
Attorneys for Petitioner